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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALFRED B. SHAPIRO and GREGORY J. WENTZ,
Petitioners,

v.

DRUG ENFORCEMENT ADMINISTRATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED*

Whether the Privacy Act, 5 U.S.C. § 552a, constitutes a partial repeal of the Freedom of Information Act, 5 U.S.C. § 552, and thus constitutes the sole means by which individuals may seek disclosure of information about themselves that has been collected by federal law enforcement agencies, so that such individuals may categorically be denied access to information about themselves, in the unreviewable discretion of an agency head under Section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2), while third-parties can be denied access to the same information only to the extent that parts of it may be exempt from disclosure, subject to judicial review, under the specific exemptions of the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(b)(9).

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* Petitioners, who are individuals, were the only parties plaintiff in the district court. Respondent Drug Enforcement Administration, an agency of the federal government, was the only defendant below.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 53-69) is reported at 721 F.2d 215. The memorandum opinion of the district court (J.A. 47-52) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25 a) was entered on November 16, 1983. The petition for a writ of certiorari was filed on December 8, 1983, and granted on April 2, 1984 (J.A. 70). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

1. The Privacy Act And FOIA Requests.

In May 1981, Gregory J. Wentz, who was then a federal prisoner, filed a request under the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, asking that the Drug Enforcement Administration ("DEA") provide him with copies of agency records pertaining to himself (J.A. 14-15). In July 1981, Mr. Wentz also requested disclosure of agency records used in preparing his pre-sentence report (J.A. 19). In March 1982, when DEA still had not acted on these requests, Mr. Wentz commenced this action in the United States District Court for the Western District of Wisconsin, to require release of the requested records (J.A. 3-6). In an amendment to his complaint, Mr. Wentz also sought the correction of certain errors he believed to be contained in those records (J.A. 29-31).

DEA eventually denied Mr. Wentz's requests in April 1982 (J.A. 27-28). The agency asserted (J.A. 27) that all of the

requested records were exempt from disclosure under the Privacy Act because they were contained in a system of records which the agency had exempted from disclosure by an administrative regulation promulgated under subsection (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2). Based on that regulation, DEA also asserted (J.A. 27) that the records were exempt from disclosure under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3).

In October 1981, Alfred B. Shapiro, who was then a federal prisoner, filed a similar request for disclosure of DEA records pertaining to himself (J.A. 40). In May 1982, when the agency still had not acted on his request, Mr. Shapiro brought suit in the United States District Court for the Western District of Wisconsin, to require disclosure of the requested records (J.A. 7-9). In June 1982, DEA advised Mr. Shapiro that the records he sought were contained in a system of records that had been exempted from disclosure by regulation and were therefore exempt from disclosure under both the Privacy Act and FOIA (J.A. 46).

2. The Decision Of The District Court.

DEA moved for summary judgment in both actions, based upon virtually identical affidavits (J.A. 10-13, 37-39) authored by Mr. Russ Arslan, a DEA official. Mr. Arslan asserted (J.A. 12-13, 38-39) that all of the requested records were contained in a system of records that had been exempted from disclosure by a regulation (28 C.F.R. § 16.98) promulgated under subsection (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2).

Mr. Wentz later moved in the district court for entry of an order requiring DEA to prepare an index of the records that had been withheld. *See Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The district court denied that motion on August 4, 1982 (J.A. 33-35).[1]

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[1] Although Mr. Shapiro made a similar motion (Shapiro O.R. Item 9), the record reflects no ruling on that motion.

On October 8, 1982, after the two cases had been consolidated, the district court granted DEA's motions for summary judgment (J.A. 47-52). The district court held (J.A. 50-51) that the requested records were exempt from disclosure under subsection (j)(2) of the Privacy Act because they were contained in a system of records which DEA had exempted from disclosure by regulation (28 C.F.R. § 16.98(c)). The district court further held (J.A. 50) that the Privacy Act is an exempting statute under Exemption 3 of FOIA (5 U.S.C. § 552(b)(3)), and that the records were therefore also exempt from disclosure under FOIA. Finally, the district court held (J.A. 52) that the exemption contained in subsection (j)(2) of the Privacy Act applies to the correction and civil enforcement provisions of the Act, 5 U.S.C. §§ 552a(d) and 552a(g). The court therefore concluded (J.A. 52) that the agency had correctly denied Mr. Wentz's request for relief under those provisions.[2]

3. The Decision Of The Court Of Appeals.

On November 16, 1983, the Seventh Circuit affirmed the judgments in both cases (J.A. 53-69).[3] First, the court held (J.A. 55-57) that the requested records were exempt from disclosure under the Privacy Act because the Arslan affidavits established that the records were contained in the agency's Investigative Reporting and Filing System, which, pursuant to the procedures mandated by subsection (j)(2) of the Act (5

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[2] The district court subsequently granted leave to appeal *in forma pauperis* (Pet. App. 31a-34a). The Seventh Circuit appointed counsel to present oral argument after Mr. Shapiro and Mr. Wentz had filed *pro se* briefs.

[3] In doing so, the Seventh Circuit followed its own prior decision in *Terkel* v. *Kelly*, 599 F.2d 214 (1979), *cert. denied*, 444 U.S. 1013 (1980), and the Fifth Circuit's decision in *Painter* v. *FBI*, 615 F.2d 689 (1980). The Seventh Circuit also expressly rejected the contrary holdings of the Third Circuit in *Porter* v. *U.S. Dept. of Justice*, 717 F.2d 787 (1983), and *Provenzano* v. *U.S. Dept. of Justice*, 717 F.2d 799, *reh. denied*, 722 F.2d 36 (1983), *cert. granted*, No. 83-1045 (Apr. 2, 1984), as well as the contrary holding of the District of Columbia Circuit in *Greentree* v. *U.S. Customs Service*, 674 F.2d 74 (1982).

U.S.C. § 552a(j)(2)), had been exempted from disclosure by regulation (28 C.F.R. § 16.98(c)).

Second, the Seventh Circuit held that DEA was not required to prepare a *Vaughn* index because subsection (j)(2) of the Privacy Act, unlike the particularized exemptions of FOIA (5 U.S.C. § 552(b)), applies to entire systems of records (J.A. 57). Once it has been established that the requested information is contained in a system of records that has been exempted from disclosure in compliance with the procedural requirements of subsection (j)(2), the court reasoned, there is no purpose to be served by a *Vaughn* index because no further judicial inquiry is required (J.A. 57-58).

Third, the Seventh Circuit held that the requested records were also exempt under FOIA because " 'that . . . Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt' " (J.A. 59, *quoting Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1039 (1980)). The court noted that FOIA Exemption 3 "provides that the FOIA does not apply to information 'specifically exempted' by other statutes" (J.A. 58, *quoting* 5 U.S.C. § 552(b)(3); footnote omitted). Since it found that the Privacy Act constitutes an exempting statute under FOIA Exemption 3, the court concluded that disclosure was not required by FOIA (J.A. 60).

As the Seventh Circuit noted, however, "to qualify under FOIA Exemption 3, a statute must specifically exempt the requested information from disclosure, and either must 'leave no discretion on the issue' of disclosure, or must establish 'particular criteria for withholding' or refer to 'particular types of matters to be withheld' " (J.A. 60, *quoting* 5 U.S.C. § 552(b)(3)). While recognizing that subsection (j)(2) of the Privacy Act grants unfettered discretion to certain agencies to exempt certain "system[s] of records within the agency from [the disclosure and other requirements of] any part of [the Privacy Act]" (5 U.S.C. § 552a(j)(2)), the court nonetheless held that this provision is sufficient under FOIA Exemption 3 to exempt such records from disclosure under both statutes

(J.A. 69). The court further held that "[s]ince [subsection] (j)(2) also covers requests for corrections, the denial of Wentz's request for correction of the allegedly inaccurate records also was proper" (J.A. 69).

Although the Seventh Circuit recognized that subsection (b)(2) of the Privacy Act (5 U.S.C. § 552a(b)(2)) specifically preserves FOIA disclosure rights, the court held that this provision applies only to so-called "third-party requests," that is, to requests by persons who are seeking access to information about others, rather than themselves (J.A. 62). In the court's view (J.A. 62), first-party requesters may seek disclosure only under subsection (d) of the Privacy Act (5 U.S.C. § 552a(d)), and the access rights created by that subsection may therefore be withdrawn by administrative regulation under subsection (j).

SUMMARY OF ARGUMENT

The central question presented in this case is whether Congress intended, when it enacted the Privacy Act, 5 U.S.C. § 552a, to abrogate the established right of individual citizens to seek disclosure under FOIA, 5 U.S.C. § 552, of government records pertaining to themselves. In holding that Congress intended that result, the Seventh Circuit disregarded the plain language and legislative history of both statutes. The judgment below should therefore be reversed.

Although FOIA and the Privacy Act both mandate disclosure of government records, the two statutes are somewhat different in purpose and scope. The central purpose of FOIA is to ensure "access to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). By contrast, the central purpose of the Privacy Act is to "provide certain safeguards for an individual against an invasion of personal privacy" by controlling the collection, main-

tenance, use and dissemination of individually identifiable records (PA Source Book 501 (Pub.L. 93-579, § 2 (1974))).[4]

Under FOIA, "any person," regardless of his identity and without any showing of special need, may obtain disclosure of government records, except to the extent that they are exempt from disclosure under one of the nine specific exemptions created by FOIA (5 U.S.C § 552). In the event that part of a record is exempt, the remainder must be disclosed (5 U.S.C. § 552(b)). By contrast, the Privacy Act grants, to certain individuals who are the subjects of government records, certain special access, correction, and other rights (5 U.S.C. § 552a(d)), with respect to records "from which information is retrieved by the name [or other personal identifier] of the individual" (5 U.S.C. § 552a(a)(5)). Unlike FOIA, the Privacy Act grants certain agencies unfettered discretion to exempt certain "system[s] of records within the agency" from these special requirements (5 U.S.C. § 552a(j)). However, this exemptive authority is specifically limited to the access, correction, and other provisions of "this section," that is, the Privacy Act itself. Subsection (j) cannot therefore be construed to authorize the withholding of any information that would otherwise be required to be disclosed under FOIA. That result is consistent with the central purpose of the Privacy Act, which is to protect personal privacy, not government secrecy. Moreover, subsection (b)(2) of the Privacy Act expressly preserves the rights of "any person [to] the disclosure[s] . . . required [by FOIA]" (5 U.S.C. § 552a(b)(2)). Similarly, subsection (q) of the Privacy Act (5 U.S.C. § 552a(q)) provides that the exemptions contained in FOIA may not be used to block any disclosure required to be made under the Privacy Act. Together, these subsections plainly evidence Congress's intention that the dis-

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[4] "PA Source Book" refers to Senate Comm. on Gov't Operations and House Comm. on Gov't Operations, *Legislative History of the Privacy Act of 1974, Source Book on Privacy*, 94th Cong., 2d Sess. (Jt. Comm. Print 1976). "FOIA Source Book" refers to House Comm. on Gov't Operations and Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974*, 94th Cong., 1st Sess. (Jt. Comm. Print 1975).

closure rights created by the two statutes should be deemed complementary and cumulative.

The Seventh Circuit acknowledged (J.A. 62) that subsection (b)(2) of the Privacy Act preserves the disclosure rights created by FOIA, but held that those rights are preserved only for "third-party requesters", that is, parties seeking information about other persons. The court below based this conclusion on the view that Congress intended subsection (d)(1) of the Privacy Act (5 U.S.C. § 552a(d)(1)) to constitute the sole means by which "first-party requesters," persons seeking access to government records concerning themselves, may seek such disclosure. But neither the language nor the legislative history of subsection (d)(1) evidences any such intention. Moreover, Congress's deliberate use in subsection (b) of the comprehensive term "any person," the same term used in FOIA itself, is plainly inconsistent with any such intention. Finally, the Seventh Circuit's construction is contrary to the special solicitude which Congress showed for individual citizens and resident aliens, for whose especial benefit the Privacy Act was enacted (5 U.S.C. § 552a(a)(2)). Since the Seventh Circuit's construction does not affect the FOIA rights of third-parties to seek individually identifiable records pertaining to others, this construction creates a preferred position for third-party requesters. This construction also creates a preferred position for business entities and foreign nationals, whose rights under FOIA to seek access to government records pertaining to themselves are clearly unaffected by the Privacy Act, which has no application to them.

The legislative history of both statutes further demonstrates that Congress did not intend to abrogate first-party FOIA access when it enacted the Privacy Act. Subsection (b)(2) of the Privacy Act, which explicitly preserves the FOIA access rights of "any person," was reinserted in the final version of the Privacy Act to satisfy the Senate's demand that the "status quo" be preserved with respect to the disclosure of personal information under FOIA (PA Source Book 861 (120 Cong. Rec. 40405 (1974)) (Analysis of House and Senate Compromise Amendments to the Federal Privacy Act)). The "sta-

tus quo" was, of course, that "any person," whether a first-party or a third-party requester, was entitled to disclosure of any government records that were not exempt from disclosure under one of the nine specific FOIA exemptions (5 U.S.C. § 552(b)(1)-(b)(9)).

The Seventh Circuit's construction can stand only if the Privacy Act (a) constitutes a partial, implied repeal of FOIA, or (b) is a FOIA Exemption 3 statute. The Privacy Act is neither of these. First, the Privacy Act does not satisfy the stringent requirements of a repeal by implication because Congress manifested no such intent and the two statutes are not irreconcilable. Indeed, the plain language of the Privacy Act evidences Congress's intention to preserve the complementary rights created by the two statutes. *See* 5 U.S.C. §§ 552a(b)(2) and 552a(q). Second, the Privacy Act is not a FOIA Exemption 3 statute. Since the Privacy Act specifically preserves FOIA access for "any person," and the reach of the Privacy Act's exemptions is expressly limited to the Privacy Act itself, records that have been administratively exempted from the access and other provisions of the Privacy Act cannot be deemed "specifically exempted from disclosure by statute" under FOIA (5 U.S.C. § 552(b)(3)). Indeed, subsection (j) of the Privacy Act does not even exempt records "by statute" because it merely authorizes agencies, if they wish, to create exemptions by regulation. The statute itself exempts nothing from disclosure.

Moreover, to qualify under Exemption 3, a statute must "(A) require[ ] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish[ ] particular criteria for withholding or refer [ ] to particular types of matters to be withheld" (5 U.S.C. § 552(b)(3)). Subsection (j) of the Privacy Act meets neither of these requirements. First, it does not meet the requirements of proviso (A) because it is wholly discretionary and does not "require" any withholding. In addition, subsection (j) fails to exempt the disclosure of records "from the public" because its exemptive authority is limited to first-party requests. The same records admittedly may be disclosed "to the public"

under FOIA. Second, subsection (j) does not meet the particularity requirements of proviso (B) because it allows agencies to withhold entire systems of records. It neither establishes "particular criteria for withholding" nor "refers to particular types of matters to be withheld."

ARGUMENT

I.

THE PRIVACY ACT EXPLICITLY PRESERVES THE FULL ACCESS RIGHTS AVAILABLE TO ALL REQUESTERS UNDER FOIA.

It is beyond dispute that the Privacy Act does not affect the rights of third parties to invoke the provisions of FOIA to seek access to government records pertaining to other persons. *See* J.A. 62. Similarly, the Privacy Act cannot affect the rights of business entities and non-resident aliens to invoke the provisions of FOIA to seek government records, pertaining either to themselves or to third parties, because the Privacy Act has no application to such persons. *See* 5 U.S.C. § 552a(a)(2). The question involved here is whether the Privacy Act categorically precludes individual citizens and resident aliens from invoking FOIA to seek disclosure of government records pertaining to themselves. The Seventh Circuit held (J.A. 62) that the Privacy Act provides the exclusive means by which such individuals may seek access to information about themselves. That holding is contrary to the explicit language of both statutes.

A. The Privacy Act Specifically Preserves The Full Disclosure Rights To Which "Any Person" May Be Entitled Under FOIA.

Prior to the enactment of FOIA in 1966, government agencies had broad discretion to withhold government records. *See* 5 U.S.C. § 1002 (1946). Because of the extent to which agencies had exercised that discretion, Congress enacted FOIA to ensure "access to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public right to secure such information from possibly unwilling

official hands." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). FOIA "establish[es] a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). *See also* H.R. Rep. No. 1497, 89th Cong. 2d Sess. 1-6 (1966). Under FOIA, records must therefore be disclosed, except to the extent that they are exempt from disclosure on one of nine specific statutory grounds (5 U.S.C. § 552(b)(1)-(b)(9)).

Disclosure of government records under FOIA is specifically made available to "any person" (5 U.S.C. § 552(a)(3)), which includes any "individual, partnership, corporation, association, or public or private organization other than an agency" (5 U.S.C. § 551). Prior to the enactment of FOIA, a party seeking disclosure of government records was required to show that he was "a person directly and properly concerned" (5 U.S.C. § 1005 (1946)). When Congress enacted FOIA in 1966, it deliberately omitted that requirement so that a requester need not now show any particularized interest in or need for the requested records. *See* Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 765 (1967). Thus, FOIA affords no basis for distinguishing between persons requesting records pertaining to themselves ("first-party requesters") and those requesting records pertaining to other persons ("third-party requesters").

Like FOIA, the Privacy Act is a remedial statute. It was enacted in 1974 for the special purpose of reforming the manner in which certain agency records—those "from which information is retrieved by the name [or other personal identifier] of the individual" (5 U.S.C. § 552a(a)(5))—are compiled, maintained, and disclosed. *See* S. Rep. No. 1183, 93d Cong., 2d Sess. 2 (1974); H.R. Rep. No. 1416, 93d Cong., 2d Sess. 2 (1974). The purpose of the Privacy Act is not to promote government secrecy, but to protect "individual privacy by controlling the collection, management and dissemination of individually identifiable records" (PA Source Book 1187 (121 Cong. Rec. 32893 (1975)) (Congressional Research Service Memorandum)). With respect to such individually identifiable

records, subsection (d)(1) of the Privacy Act (5 U.S.C. § 552a(d)(1)) grants special access rights to those subjects of government records who are American citizens or permanent resident aliens (5 U.S.C. § 552a(a)(2)). The purpose of these special access rights, which are separate in purpose and operation from the more general disclosure rights created by FOIA, is to provide the means by which subjects of government records can enforce the other rights to which they are entitled under the Privacy Act.[5]

FOIA and the Privacy Act both require disclosure of government records in certain circumstances, and "[e]ach seeks in different ways to respond to the potential excesses of government." *Greentree* v. *U.S. Customs Service*, 674 F.2d 74, 76 (D.C. Cir. 1982). But the specific purposes of the two statutes are different. It is not surprising, therefore, that the Privacy Act contains two savings provisions, which plainly manifest Congress's intention that the disclosure rights created by the

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[5] The various provisions of the Privacy Act are designed to further the central statutory purpose of ensuring the privacy and accuracy of those agency records that are retrievable through the name or other personal identifier of the subject individual. Other provisions of subsection (d) permit the subject of such records to challenge their accuracy, petition for their correction, and require the agency to include a statement of the subject's disagreement in any materials that are disclosed (5 U.S.C. § 552a(d)). Subsection (b) prohibits agency disclosure of records concerning individuals except in specified circumstances (5 U.S.C. § 552a(b)). Subsection (c) requires each agency to keep and make available to the subject individual an account of all public and interagency disclosures under the Privacy Act of records relating to the individual (5 U.S.C. § 552a(c)). Subsection (e) establishes a variety of stringent record gathering, record keeping, and notice requirements for agencies which maintain individual records (5 U.S.C. § 552a(e)). Subsections (g) and (i) provide for civil and criminal remedies, respectively, when agency officials have failed to comply with the requirements of the statute (5 U.S.C. §§ 552a(g) and (i)). Subsections (l) through (n) establish rules for the handling of specialized types of individual records (5 U.S.C. §§ 552a(l)-(n)).

two statutes should be deemed complementary and cumulative. First, Congress provided in subsection (q) that "[n]o agency shall rely on any [FOIA] exemption . . . to withhold from any individual any record which is otherwise accessible to such individual under the provisions of [the Privacy Act]" (5 U.S.C. § 552a(q)). Thus, the limited and specialized access mandated by subsection (d)(1) of the Privacy Act (5 U.S.C. § 552a(d)(1)) cannot be blocked by any exemption from disclosure contained in FOIA. Second, in subsection (b)(2) of the Privacy Act (5 U.S.C. § 552a(b)(2)), Congress expressly preserved the disclosure rights of "any person" entitled to disclosure under FOIA.[6] Like FOIA, subsection (b)(2) of the Privacy Act explicitly applies to "any person" and affords no basis for distinguishing between first-party and third-party requests. Contrary to the holding below (*see* J.A. 62), the language of subsection (b)(2) is plain, and it does not purport to protect the disclosure rights only of "any person other than a first-party requester." Congress's use, in both statutes, of the term "any person" is not accidental, and that term must be accorded its plain meaning in both statutes. *See CPSC* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980); *Caminetti* v. *United States*, 242 U.S. 470, 485-86 (1917); 2A C. Sands, *Statutes and Statutory Construction* § 45.01 (4th ed. 1973).[7]

Thus, the District of Columbia Circuit correctly rejected the reasoning adopted by the Seventh Circuit in the case at bar, holding that "section (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access." *Greentree* v. *U.S. Customs Service*, 674 F.2d at 79 (emphasis in original). *See also Crooker* v. *U.S.*

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[6] In pertinent part, subsection (b) provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—* * * (2) required under section 552 of this title" (5 U.S.C. § 552a(b)(2)).

[7] Significantly, the same definition of "person" applies under both the Privacy Act and FOIA. *See* 5 U.S.C. § 551.

Parole Comm., 730 F.2d 1, 10 (1st Cir. 1984) ("the Privacy Act by its terms cannot justify withholding information where the FOIA requires disclosure"). In reaching the contrary conclusion, the court below did not construe the Privacy Act, but rewrote it to conform to certain policy arguments advanced by the government. Thus, by focusing solely upon the access provisions of the Privacy Act, the Seventh Circuit concluded that the construction adopted in *Greentree* "would result in an emasculation of Privacy Act Exemption (j)(2)," the scope of which "thus would be limited to the scope of any applicable FOIA exemptions" (J.A. 63). The court's reasoning is incorrect, however, because FOIA exemptions are exemptions from disclosure, while Privacy Act exemptions may supersede several additional rights granted by the Privacy Act, including the recordkeeping and correction provisions. *See* pages 31-32, *infra*.*

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* The Seventh Circuit rested its holding on its perception of Congress's general concern "that individuals not be permitted access to certain records containing information about their own criminal investigations" (J.A. 63). In these circumstances, such a generalized concern cannot provide a true compass for ascertaining Congress's intent. *See CPSC* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980). Moreover, the focus of Congress's concern was specifically directed to assuring that first-parties would not, as a result of the Privacy Act, have greater access to such investigatory materials than they already had under FOIA. Congress satisfied that concern in a specific way by including subsection (j), which plainly allows certain agencies to exempt systems of records from the *special* access, record-keeping and correction provisions of the Privacy Act itself. Congress's general concern certainly cannot overcome the specific language of subsection (j), which is limited in its scope to "this section," that is, to the Privacy Act itself. *See* K. Davis, *Ad. Law Treatise* § 5.43 at 100 (1982 Supp.) *See also* pages 15-16, *infra*. Indeed, there is nothing in the language or legislative history of the Privacy Act to suggest that Congress also intended, with respect to first-party requests for such materials, to create a barrier to disclosure higher than that which it had painstakingly crafted only a few weeks before, when it amended FOIA Exemption 7, 5 U.S.C. § 552(b)(7). *See* pages 25-27, *infra*. Finally, the legislative history upon which the Seventh Circuit relied (J.A. 63-64) in reaching the opposite conclusion is wholly inapposite

The reasoning adopted by the Seventh Circuit was properly rejected by the *Greentree* court, which held that "we are not at liberty to limit the safeguards of (b)(2), which extend to requests by 'any person' " (674 F.2d at 79). As the *Greentree* court recognized, the only conceivable purpose to be served by subsection (b)(2) is to preserve FOIA disclosure rights for all requesters (674 F.2d at 79). If Congress had intended the Privacy Act to constitute the sole means of access for first-party requesters, it surely would not have included this unqualified reservation of FOIA access in subsection (b)(2). *Accord Porter* v. *U.S. Dept. of Justice*, 717 F.2d 787, 794 (3d Cir. 1983).[9]

In reaching the contrary conclusion (J.A. 62), the Seventh Circuit also misconstrued the clause in Privacy Act subsection (b) which prohibits disclosure under the Privacy Act "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." This clause has no application, of course, where "disclosure of the [requested] record would be . . . required under [FOIA]" (5 U.S.C. § 552a(b)(2)). Relying exclusively on this clause, however, the Seventh Circuit erroneously concluded (J.A. 62) that subsection (b)(2) preserves only third-party disclosure rights under FOIA. But this clause merely conditions disclosure under the Privacy Act—in those circumstances in which disclosure is not required by FOIA—on the making of a *written* first-party request or the filing of a *written* first-party consent.

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because it relates to prior versions of the bill, which were not enacted.

[9] Other provisions of the Privacy Act confirm Congress's intention that the rights created by the two statutes should be considered separately. For example, agencies need not comply with the disclosure accounting provisions of the Privacy Act, 5 U.S.C. § 552a(c)(1), when, under FOIA, they disclose records which otherwise would be subject to those provisions. Similarly, when disclosure is made under FOIA, agencies need not comply with the requirement of subsection (e)(6) of the Privacy Act, 5 U.S.C. § 552a(e)(6), that they establish the accuracy, completeness, timeliness and relevance of records prior to their disclosure.

The clause permits agencies to release records pursuant to either a first-party or third-party request, but requires in either case that the subject of the records manifest his consent in writing.[10] In sum, there is no basis for contending that subsection (b)(2) preserves FOIA disclosure rights only for the third-party requesters.

B. The Exemptions Contained In The Privacy Act Cannot Provide Any Basis For Precluding Disclosure Under FOIA Because Their Applicability Is Expressly Limited To The Privacy Act Itself.

The explicit reservation of FOIA access to "any person" in subsection (b)(2) is reinforced by the language used in the exemption subsections of the Privacy Act. Subsections (j) and (k) permit certain agencies to promulgate rules "to exempt any system of records within the agency from any part of *this section*." 5 U.S.C. §§ 552a(j) and 552a(k) (emphasis added). Subsections (j) and (k) plainly authorize agencies to exempt systems of records from the access, correction, and certain other requirements of the Privacy Act, but not from the disclosure requirements of FOIA. Congress's use of the words "this section" was not inadvertant. Congress clearly intended to limit the scope of these exemptions to Section 552a, the Privacy Act itself. *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 79. If Congress had intended to authorize agencies to

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[10] Unlike FOIA, subsection (b) of the Privacy Act conditions the release of individually identifiable records upon the presentation of a *written* request. The rationale for this additional requirement is rooted in the divergent purposes and schemes of the two statutes. Under FOIA, of course, the requester's identity is immaterial because disclosure depends upon the nature of the requested records, not the identity of the requester. Under the Privacy Act, however, the requester's identity is crucial. In response to Privacy Act requests, government agencies therefore insist on the making of some verification that the subject of the records has either made the request himself or has actually authorized the release of the records to a third-party requester. This verification process is well illustrated by DEA's handling of the requests made by Mr. Wentz and Mr. Shapiro. *See* J.A. 16-17, 41-42.

exempt themselves from the requirements of FOIA, Congress certainly would not have used the language it did. When Congress intended to refer to FOIA in other parts of the Privacy Act, it did so explicitly. *See* 5 U.S.C. §§ 552a(b)(2) and 552a(q). Moreover, when Congress intended in the Privacy Act to refer to other parts of Title 5, such as FOIA, it used the term "this title." *See* 5 U.S.C. §§ 552a(j) and 552a(q). *See also Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 797 ("Had Congress intended to authorize the creation by regulation of exemptions from [FOIA] it would have used language such as 'this title' rather than 'this section' ").

Nor does Congress's use of the term "this section" lend any support to the contention that Congress intended the Privacy Act to constitute the exclusive means by which first-party requesters may seek access to records pertaining to themselves. Subsection (j) specifically provides that agencies may promulgate administrative exemptions "from any part of this section *except subsection[ ](b), . . .*" (5 U.S.C. § 552a(j)). Thus, the express reservation of unqualified FOIA access established in subsection (b)(2) of the Privacy Act is explicitly incorporated in subsection (j), which cannot therefore be construed to authorize agencies to promulgate any rules that would nullify the FOIA disclosure rights of "any person."[11]

C. The Language Of Subsection (d)(1), The First-Party Access Provision Of The Privacy Act, Manifests No Congressional Intention That The Privacy Act Should Be The Sole Means Of First-Party Access.

Despite the Privacy Act's express reservation to "any person" of the disclosure rights granted by FOIA (5 U.S.C. § 552a(b)(2)), and the express limitation of its exempting authority to the other provisions of the Privacy Act itself (5

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[11] Significantly, each of the exceptions to the exempting authority granted by subsection (j) relates to other provisions of the Privacy Act. This fact reinforces the conclusion that the Privacy Act exemptions are self-contained and are not intended to affect any disclosure mandated by other statutes. *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 79.

U.S.C. §§ 552a(j) and 552a(k)), the Seventh Circuit held (J.A. 62) that subsection (d)(1) supersedes FOIA access with respect to first-party requests by American citizens and resident aliens. *See* pages 18-20, *infra*. Neither subsection (d)(1) nor any other provision of the Privacy Act evidences any congressional intention that this subsection is to be the sole statutory vehicle for first-party access to government records. "There is not a word in that [subsection] suggesting that the special remedy which it provides for the vindication of privacy rights which Congress identiied in its legislative findings was to be exclusive of all other rights which the law might elsewhere provide." *Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 797.

The meaning of any statutory provision must be ascertained in light of its statutory context. *Chemeheuvi Tribe of Indians* v. *FPC*, 420 U.S. 395, 403 (1975); *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). The context of subsection (d)(1) within the Privacy Act further demonstrates that it was not intended to be the sole means of first-party access to records.

Unlike FOIA, the central purpose of the Privacy Act is not to guarantee disclosure of government records, but to assure individual privacy and the accuracy of individually indentifiable government records. Thus, the access permitted by subsection (d)(1) is not an end in itself, but a means to assuring the privacy and accuracy of such records. Such access is obviously an essential prerequisite to enforcing the other rights granted by the Privacy Act, most of which presuppose the individual's familiarity with the contents of agency records. *See* 5 U.S.C. §§ 552a(d)(2)-(d)(4), (g)(1)(A). *See also* PA Source Book 888, 915 (120 Cong. Rec. 36648, 36657 (1974) (remarks of Rep. Erlenborn)); *Binion* v. *U.S. Dept. of Justice*, 695 F.2d 1189, 1192 (9th Cir. 1983). Subsection (d)(2) provides that an individual who has reviewed his records may "request amendment of a record pertaining to him." Under subsection (d)(3), an individual who disagrees with an agency official's refusal to amend his record may request further administra-

tive review, and may ultimately seek judicial review under subsection (g)(1)(A). Subsection (d)(4) requires that an agency must include an individual's statement of disagreement in any disclosure of the individual's record.

Thus, the context of subsection (d)(1) demonstrates that this narrow record review provision is an integral part of a statutory scheme designed to assist individuals in assuring the privacy and accuracy of government records pertaining to themselves.[12] Clearly, this provision, which exists for that specific and limited purpose, is designed to supplement rather than supersede first-party disclosure under FOIA.

D. The Construction Adopted By The Court Below Leads To Anomalous Results And Unenforceable Prohibitions.

A statute should not be interpreted in a manner that leads to incongruous results (*Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 286 (1956)), but the Seventh Circuit's construction turns the Privacy Act on its head by creating a disadvantage for those persons for whose especial benefit the statute was enacted. By construing the Privacy Act as the sole means of first-party access for American citizens and resident aliens (5 U.S.C. § 552a(a)(2)), the Seventh Circuit has created a preferred position for third-parties seeking access to the same records. Under the Seventh Circuit's reasoning, an agency may deny a first-party request whenever the requested records are located within a system of records which has been exempted from disclosure under subsection (j) of the Privacy Act. This exemption from disclosure is categorical and applies to the entire "system of records," without regard to the character of any particular record. On judicial review, the only relevant question is whether the system of records was properly exempted.

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[12] The link between the access and amendment provisions of the Privacy Act is further evidenced by the analogous proximity between the two subsections which permit an individual to enforce these rights in court. *See* 5 U.S.C. §§ 552a(g)(1)(A)-(g)(1)(B).

By contrast, a third-party requester retains the right to seek the same records under FOIA. In that case, the agency must index the records, tender any "reasonably segregable portions" of records which are not exempt under subsection (b) of FOIA (5 U.S.C. § 552(b)), and defend in court any exemption which it wishes to assert with respect to any other portions of such records (5 U.S.C. § 552(a)(4)(B)). Thus, for example, a third-party FOIA requester could obtain law enforcement records concerning an individual, to the extent that they are not exempt from disclosure on one of the narrow grounds established in FOIA Exemptions 6 and 7 (5 U.S.C. § 552(b)(6)-(b)(7)), but the same records could be categorically withheld from the subject under subsection (j)(2) of the Privacy Act (5 U.S.C. § 552a(j)(2)). This construction, which affords greater substantive and procedural rights to third-parties, has been characterized by courts and commentators as the "third-party anomaly." *See, e.g., Greentree* v. *U.S. Customs Service*, 674 F.2d at 79. It is certainly inconsistent with the principal purpose of the Privacy Act.

The Seventh Circuit's construction gives rise to a second anomaly. The provisions of the Privacy Act are applicable only to "individuals," which are defined as American citizens and permanent resident aliens (5 U.S.C. § 552a(a)(2)). The term does not include business entities or foreign nationals. *See* PA Source Book 232 (S. Rep. No. 1183, 93d Cong., 2d Sess. 79 (1974)). However, FOIA disclosure is available to "any person," which includes "an individual, partnership, corporation, association, or public or private oganization other than agency" (5 U.S.C. § 551(2)). For purposes of FOIA, the term "person" includes business entities and foreign nationals. *Kent Corp.* v. *NLRB*, 530 F.2d 612, 616 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Raven* v. *Panama Canal Co.*, 583 F.2d 169, 171 (5th Cir. 1978), *cert. denied*, 440 U.S. 1044 (1979); *Neal-Cooper Grain Co.* v. *Kissinger*, 385 F. Supp. 769, 776 (D.D.C. 1974).

These definitions plainly manifest Congress's intent that this limited class of natural persons—American citizens and permanent resident aliens—should be afforded greater disclosure rights than business entities and foreign nationals.

Under the Seventh Circuit's construction, however, the opposite is true. By holding that the Privacy Act is the sole means of first-party access for American citizens and permanent resident aliens, the Seventh Circuit has created a preferred position for foreign nationals and business entities. The latter must be afforded access to government records concerning themselves, subject only to the nine specific and limited FOIA exemptions, while American citizens and permanent resident aliens will be denied access to analogous records whenever an agency has determined to place those records in a system of records which has been exempted from disclosure under subsection (j) of the Privacy Act (5 U.S.C. § 552a(j)). *See Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 795.

Finally, the Seventh Circuit's construction is impracticable. As the *Greentree* court recognized, the construction adopted by the Seventh Circuit places a premium on chicanery since the barrier to first-party disclosure may be avoided by requisitioning a surrogate to act as a third-party FOIA requester (674 F.2d at 79). "It cannot be presumed that the legislature would do a futile thing." 2A C. Sands, *Sutherland Statutory Construction* § 45.12 at 37 (4th ed. 1973). Congress surely could not have intended that the vindication of such important rights should be made to depend upon the willingness of individual requesters, most of whom will not have legal counsel to assist them. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982); *Love* v. *Pullman*, 404 U.S. 522, 527 (1972). Nor could Congress have intended that federal agencies and the judiciary should expend scarce resources in determining whether a particular FOIA request was made by a genuine third-party requester, rather than by an accommodation party acting in lieu of a first-party requester. *See Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 795. *See generally Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *United States* v. *Del Toro*, 513 F.2d 656, 662 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975).

II.

THE LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS DID NOT INTEND THAT THE PRIVACY ACT SUPPLANT THE DISCLOSURE RIGHTS OF FIRST-PARTY REQUESTERS UNDER FOIA.

The legislative history of the Privacy Act and FOIA further confirm that Congress did not intend to abolish first-party FOIA access by enacting the Privacy Act.

A. Congress Intentionally included Language In The Privacy Act To Ensure That The Exemptions Contained In Each Act Would Be Self-Contained.

The legislative history of the Privacy Act further evidences that subsection (b)(2) was inserted for the purpose which its language manifests, that is, to assure that the Privacy Act would not be construed to alter the disclosure rights which FOIA grants to "any person," including first-party requesters. Prior to its enactment, the Privacy Act underwent several changes as the two Houses debated the proper scope of the Act. Among other things, the two Houses debated the question whether the Privacy Act should constitute the sole means for securing access to individually identifiable government records. That debate was resolved by Congress's inclusion of subsection (b)(2), which unequivocally preserves FOIA access for all requesters.

The final Senate version of the privacy bill passed the Senate on November 22, 1974 (PA Source Book 375 (H.R. 16373 as amended by the Senate)). That version contained subsection 205(b), which had been included by the Senate Committee on Government Operations for the express purpose of preserving the full disclosure rights created by FOIA and other disclosure statutes. Subsection 205(b) provided that: "[n]othing in this Act shall be construed to permit the withholding of any personal information which is otherwise required to be disclosed by law or any regulation thereunder" (PA Source Book 143, 365 (S. 3418, 93d Cong., 2d Sess. (1974)). Subsection 205(b) of the Senate bill, which is a less specific precursor of subsection

(b)(2) of the enacted bill, was specifically intended to recognize continued FOIA disclosure rights for all requesters (PA Source Book 861 (120 Cong. Rec. 40405 (1974) (Analysis of House and Senate Compromise Amendments to the Federal Privacy Act)). To further ensure the separation of the FOIA and Privacy Act exemptions, the Senate version also included a complementary provision, subsection 205(a), which explicitly provided that the exemptions contained in FOIA would not preclude the granting of any access otherwise available under the Privacy Act (PA Source Book 143, 364-65 (S. 3418, 93d Cong., 2d Sess. (1974))).

The version of the House bill that was originally introduced and referred to the House Committee on Government Operations contained subsection (b)(2) in virtually the same form in which it was later enacted by both Houses (PA Source Book 242-43 (H.R. 16373, 93d Cong., 2d Sess. 4-5 (1974))). Subsection (b)(2) was deleted by the House Committee on Government Operations, however, for the specific purpose of displacing FOIA as a means of obtaining access to records pertaining to individuals (PA Source Book 306 (H.R. Rep. No. 1416, 93d Cong., 2d Sess. 13 (1974))). The privacy bill which was finally reported by the House Committee on Government Operations was focused, more singularly than either the Senate bill or the original House bill, on preserving individual privacy (PA Source Book 437 (S. 3418 as amended by the House)). Thus, the final House version of the bill, which passed the House on December 11, 1974, contained neither the eventually-enacted subsection (b)(2) nor any other provision analogous to subsection 205(b) of the Senate bill.

On December 17, 1974, the Senate passed the final House version, after amending it in several respects (PA Source Book 459 (S. 3418 as amended by Senate)). Among other things, the Senate inserted subsection (b)(2) in its current form (*id.*). Representatives of both Houses subsequently perfected a compromise bill, which was principally based on the House version. However, the House receded on two important points (PA Source Book 501 (Pub. L. No. 93-579 (1974))). *See also* 120 Cong. Rec. 40400 (1974).

First, subsection (b)(2) of the original House version was reinserted to ensure that the Privacy Act exemptions could not be invoked to block disclosure to "any person" under FOIA (PA Source Book 501 (Pub. L. No. 93-579, § 3, 93d Cong., 2d Sess. (1974))). Second, subsection (q) was adopted from the final Senate version to assure that the FOIA exemptions could not be invoked to withhold any records otherwise available under the Privacy Act (PA Source Book 510 (Pub. L. No. 93-579, § 3 (1974))). *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 83. The simultaneous insertion of these two amendments demonstrates that Congress made a conscious choice to ensure that the disclosure rights granted by each statute would be complementary and cumulative. As the *Greentree* court concluded, "throughout its consideration of the Privacy Act, the Senate struggled to hold separate the Privacy Act and FOIA, and . . . that effort was ultimately succesful" (674 F.2d at 81).

Senator Ervin, the Senate floor manager, explained the compromise bill to the Senate. He summarized the outcome of the compromise, stating that: "We preserve most of the essential elements of the Senate bill with these few minor changes" (PA Source Book 857 (120 Cong. Rec. 40405 (1974))). Senator Ervin then published a written analysis to the Senate. This analysis, which was also published to the House (PA Source Book at 987), stated (*id.* at 861 (120 Cong. Rec. 40406 (1974)); emphasis added):

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual *unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by courts regarding the disclosure of personal information under [FOIA].*[13]

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[13] A formal conference report was not prepared, presumably because the Privacy Act was enacted in the closing days of the Ninety-third Congress and the time for preparing such a report did not exist. *See Exner* v. *FBI*, 612 F.2d 1202, 1206 n.9 (9th Cir. 1980). However,

Prior to the enactment of the Privacy Act, the "status quo" was that "any person" could invoke the provisions of FOIA to seek access to government records. *See, e.g., Hawkes* v. *IRS*, 467 F.2d 787 (6th Cir. 1972). The "status quo" admitted no distinction between first-party and third-party requests. Thus, the compromise bill preserved all existing FOIA access.[14]

The analysis presented by Senator Ervin also recognized that Privacy Act subsection (q), which provides that the FOIA exemptions may not be used to bar any disclosure mandated by the Privacy Act, is a companion provision to subsection (b)(2). The symmetrical purposes of the two provisions were clearly explained (PA Source Book 861 (120 Cong. Rec. 40406 (1974))):

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the staff analysis which Senator Ervin used to explain the compromise bill is analogous to a formal conference report because it was prepared for the Senate managers of the bill, was used by them to explain the provisions of the compromise bill to the Senate, and was relied on by the House managers during the floor debates (*see* PA Source Book 987 (120 Cong. Rec. 40881 (1974))). Since this analysis represents the only systematic explanation of the compromise bill that was presented to both Houses, it is entitled to substantial weight as evidence of Congress's intent. In any event, statements by a committee member in charge of a bill "are regarded as being in the nature of supplemental committee reports and are accorded the same weight as formal committee reports." 2A C. Sands, *Sutherland Statutory Construction* § 48.14 at 220 (4th ed. 1973). As floor manager of the bill, Senator Ervin was uniquely qualified to explain the compromise bill and had a special responsibility to do so. *See Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 14-16 (1976); *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Doherty* v. *United States*, 404 U.S. 28, 34 (1971) (Douglas, J., concurring); *Duplex Co.* v. *Deering*, 254 U.S. 443, 475 (1921) (all referring to sponsor's or committee chairman's explanations).

[14] Similarly, the purpose of subsection (b)(2) was explained by James Davidson, Counsel to the Senate Government Operations Subcommittee on Intergovernmental Relations, who played a key role in shaping the compromise legislation: "if information about an individual would be released under an FOI Act request, it could be released under b(2) of the Privacy Act" (PA Source Book 1191-92 (Davidson, *The Privacy Act of 1974-Exceptions and Exemptions*, 34 Fed. Bar J. 323, 324 (1975))).

> A related amendment taken from the Senate bill would prohibit any agency from relying upon any exemption contained in [FOIA] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of [the Privacy Act].

Senator Evin's explanation clearly demonstrates that Congress consciously decided that neither the exemptions of the Privacy Act nor those of FOIA should be used to block any disclosure mandated by the other statute. Indeed, the legislative history is devoid of any evidence at all to suggest that Congress intended subsection (b)(2) to apply only to third-party requests. In holding to the contrary, the court below went far beyond the ambit of statutory construction and based its decision on certain policy arguments with which the government now seeks to support its construction of the statute. *See* pages 12-14, *supra*. But the question presented here concerns Congress's intention in enacting the Privacy Act, and not "whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).

B. The Holding Below Is Wholly Inconsistent With Congress's 1974 Amendment To FOIA, Which Increased The Access Rights Of "Any Person" To Law Enforcement Files.

The Seventh Circuit's construction is also belied by Congress's amendment of FOIA Exemption 7, over President Ford's veto, only 40 days before it enacted the Privacy Act. *See* 10 Weekly Compilation of Presidential Documents 1318 (October 17, 1974). FOIA Exemption 7 originally permitted agencies to exempt from disclosure "investigatory *files* compiled for law enforcement purposes except to the extent available by law to a party" (5 U.S.C. § 552(b)(7) (1966); emphasis added). Some courts had expansively construed this exemption to allow agencies to withhold virtually all law enforcement records without judicial review.[15] Since that sweeping construction

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[15] *See, e.g., Center for National Policy Review* v. *Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C.

was inconsistent with Congress's original intention (*see* FOIA Source Book 332-39 (H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974))), Congress amended Exemption 7 to exempt from disclosure only "investigatory *records* compiled for law enforcement purposes," and then "*only to the extent that* the production of such records would" be harmful to one of six specific law enforcement interests (5 U.S.C. § 552(b)(7); emphasis added).

As this Court noted in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 229-30 (1978) (citations omitted), "by substituting the word 'records' for 'files,' [Congress made clear] that courts had to consider the nature of the particular document as to which exemption was claimed, in order to avoid the possibility of impermissible commingling by an agency's placing in an investigatory file materials that did not legitimately have to be kept confidential." In addition, as the Court also noted, Congress intended that the courts should scrutinize any arguably exempt records to determine whether any parts of those records actually were exempt from disclosure under one of the six specific criteria stated in Exemption 7 *(id.)*. *See also* FOIA Source Book 293 (120 Cong. Rec. 17019 (1974) (remarks of Senator Kennedy)); FOIA Source Book 515-16 (Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act).

The specific purpose of this amendment was to abrogate the government's ability to withhold whole systems of law enforcement files requested under FOIA, and it was President Ford's specific disagreement with that purpose, among other things, which led him to veto the amendment. *See* 10 Weekly Compilation of Presidential Documents 1318 (October 17, 1974). It is simply inconceivable that Congress would have intended to rebuild into Privacy Act subsection (j) the very same impenetrable barrier to the disclosure of "investigatory files" that it had dismantled only forty days earlier. And it would be perverse indeed for Congress to have intended that result only with

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Cir.), *cert. denied*, 419 U.S. 974 (1974); *Weisberg* v. *U.S. Dept. of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert denied*, 419 U.S. 993 (1974).

respect to those persons for whose especial benefit the Privacy Act was enacted. The government, which has taken its present position only since late 1981, when it filed its appellate brief in *Greentree*, eloquently made this point in its district court brief in that case, in which it stated (674 F.2d at 85 n.27):

> "It would be anomalous indeed for Congress to override a presidential veto, which was in part based on Congress' narrowing of exemption 7, only to reinstate 40 days later (via the Privacy Act) the discretionary power to deny total access to investigatory material. There is no indication whatsoever in the legislative history of the Privacy Act to indicate that Congress intended such an abrupt reversal of its recent narrowing of exemption 7."

The fact that these two bills were considered simultaneously and enacted within weeks of each other further demonstrates that Congress did not intend the systemwide exemption for law enforcement files in subsection (j) to constitute a repeal of FOIA Exemption 7 insofar as first-party requesters are concerned.[26] At the very least, Congress would have manifested such an intent in some tangible way, which it did not do.

C. The Privacy Act Does Not Constitute A Repeal By Implication Of First-Party Access Under FOIA.

Only by ignoring the plain language and legislative history of subsections (b)(2) and (j) of the Privacy Act (5 U.S.C. §§ 552a(b)(2) and (j)) is it necessary to reach the question whether the Privacy Act constitutes an implied appeal of the FOIA access rights of first-party requesters. Repeals by implication are plainly disfavored (*United States* v. *Continental Tuna Corp.*, 425 U.S. 164, 168 (1976)), and the proponent of such a repeal "bears a heavy burden of persuasion."

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[26] The same House Committee members were responsible for managing both the 1974 FOIA amendments and the Privacy Act. As Mr. Erlenborn stated on the House floor on November 20, 1974, (PA Source Book 887 (120 Cong. Rec. 36647)): "I think it is rather fitting that this [privacy] bill comes to the floor today on the same day that reconsidered a motion to override and have overridden the President's veto of the Freedom of Information Act."

Amell v. *United States*, 384 U.S. 158, 165-66 (1966). The proponent must clearly establish either (a) that Congress intended to work such an implied repeal, or (b) that the two statutes are irreconcilable. *Morton* v. *Mancari*, 417 U.S. 535, 549-50 (1974).

To demonstrate that Congress intended to repeal the earlier statute, the proponent must establish an intent that is clear and manifest. *TVA* v. *Hill*, 437 U.S. 153, 189 (1978); *Morton* v. *Mancari*, 417 U.S. at 549-50; *Pasades* v. *National City Bank*, 296 U.S. 497, 503 (1936); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842). As this Court has previously held, Congress must have clearly expressed its conscious choice in the matter. *Regional Rail Reorganization Cases*, 419 U.S. 102, 134 (1974). However, neither the language nor the legislative history of the Privacy Act manifests any congressional choice that the Privacy Act should constitute the sole means by which first-party requesters may secure access to government records. Indeed, it is inconceivable that Congress, without uttering a single word on the subject, would have chosen to abrogate the FOIA rights of first-party requesters only 40 days after it had overriden President Ford's veto of its amendment to FOIA Exemption 7, which was designed to perfect the security of those rights for all requesters. The court in *Greentree* was understandably "hard pressed to accept an interpretation of the Privacy Act that in effect repeals, for first-party requesters, those amendments only a few weeks after they were enacted over a Presidential veto" (674 F.2d at 84). "Repeal by implication is not generally favored; less so in this instance" *(id.)*. *See also Porter* v. *U.S. Dep't of Justice*, 717 F.2d at 798 ("We have searched the legislative history of all versions of S. 3418, H.R. 16373, and the compromise bill, which was enacted, and we have found nothing which suggests that Congress intended Privacy Act section 552a(d) to be a partial repeal of [FOIA] by making it the sole means of access for first-party information").

Neither are the two statutes irreconcilable. As this Court held long ago, "a positive repugnancy" must exist between two statutes to establish an implied repeal; that the later statute "covers some or even all of the cases provided for by" the earlier statute is not sufficient. *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 362-63 (1842). *Accord Clark* v. *Uebersee Finanz Korp.*, 332 U.S. 480, 489 (1947). When two statutes deal with the same subject matter, the second statute should be presumed to be "merely cumulative or auxiliary." *Wood* v. *United States*, 41 U.S. (16 Pet.) at 363.

The two statutes here are not mutually repugnant. The disclosure provisions in each statute have specific purposes and carefully tailored exemptions which serve those purposes. "The Privacy Act and [FOIA] are perfectly reconcilable by reading the special remedy in section 552a(d) as serving to vindicate privacy interests in a special manner, while leaving standing the preexisting [FOIA] remedy providing access to information for its own sake." *Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 797. "Each seeks in different ways to respond to the potential excess of government. Each therefore has its own functions and limitations." *Greentree* v. *U.S. Customs Service*, 674 F.2d at 76.

The divergent specific purposes of the two statutes well demonstrate that Congress did not intend the Privacy Act to constitute a repeal of first-party access to records through FOIA. The purpose of FOIA is to facilitate disclosure of government records, without regard to the identity of the party seeking disclosure. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1-6 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 2-6 (1965). The purpose of the Privacy Act is to provide subjects of government records with some control over the privacy and accuracy of records contained in a "system of records" from which information may be retrieved by name or other personal identifier. *See* 5 U.S.C. 552a(a)(5). As Congress has said, the purpose of the Privacy Act is to "provide[] certain safeguards for an individual against an invasion of personal privacy" (PA

Source Book 501 (Pub. L. 93-579, § 2 (1974))).[17] *See also* H.R. Rep. 1416, 93d Cong., 2d Sess. 2 (1974); S. Rep. 1183, 93d Cong., 2d Sess. 2 (1974). Disclosure under the Privacy Act is geared to achieving this purpose; it is not an end in itself. *See* pages 17-18, *supra*.

Because the Privacy Act and FOIA have different purposes, it is not surprising that their access provisions and exemptions are also different Each statute provides first-party access to some records which are not available under the other. Privacy Act subsection (j)(2) allows certain agencies to exempt entire systems of law enforcement records from the access and other provisions of the Act. Administratively, this is a logical complement to a statute which allows individuals to contest the accuracy of information contained in their files. FOIA Exemption 7, which is designed to allow access as expansive as possible, exempts from disclosure only specific records or portions thereof. When these two provisions are construed together, the most that can be said is that Congress intended that agencies should have discretion to withdraw from subjects of law enforcement records the *special* access and other rights granted by the Privacy Act. There is no support for the conclusion that Congress intended to deprive such persons of the disclosure rights to which they would have been entitled if the Privacy Act had never been enacted.

Continued first-party access under FOIA furthers the purpose of that statute, which is to allow access to information

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[17] These safeguards, which are summarized in the Congressional Statement of Purpose contained in Section 2 of the Privacy Act (PA Source Book 501), include: (1) "permit[ting] an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies," (2) "prohibit[ing] these records from being used or made available for another purpose without his consent," and (3) "permit[ting] an individual to have access to information pertaining to him . . . to have a copy made and to correct or amend such records" to ensure that an agency will "collect, maintain, use, or disseminate" the records only "for a lawful and necessary purpose," and to ensure that records are "accurate and current."

unless withholding is justified on one of the specific grounds set forth in the statute (5 U.S.C. § 552(b)(1)-(b)(9)). On the other hand, the first-party access does not conflict in any way with the central purpose of the Privacy Act, which is to assure individual privacy and the accuracy of individually identifiable records. Indeed, the contrary construction adopted by the court below does violence to the principal purposes of both statutes by blocking access under FOIA to those persons who are most likely to seek such records—on grounds not set forth in FOIA—and by allowing greater access to third parties than to the subjects of the records for whose especial benefit the Privacy Act was enacted. *See* pages 18-20, *supra*.[15]

Nor will the systemwide exemption of subsection (j) be rendered meaningless, as the Seventh Circuit held (J.A. 67), if first-party requesters may obtain some of the same records, or parts of the same records, under FOIA. Since FOIA Exemption 7 blocks disclosure only under FOIA (*see* 5 U.S.C. § 552a(q)), a first-party requester could obtain his entire law enforcement file under the Privacy Act—if subsection (j) did not exist. *Greentree* v. *U.S. Customs Service*, 674 F.2d at 80. Thus, subsection (j) allows government agencies to withhold from first-party requesters records which would otherwise be available to them under the Privacy Act, but not under FOIA. Nor does the fact that a first-party requester retains FOIA access rights mean that requested law enforcement records necessarily will be available under FOIA. To the extent that

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[15] First-party FOIA access serves an important statutory purpose because persons who are the subjects of government records are those most likely to request disclosure of records pertaining to them, and it is only through the granting of disclosure that questionable government practices will be brought to light. As Professor Davis has noted (K. Davis, *Ad. Law Treatise* § 5.6 at 43 (1982 Supp.): "Surprisingly, some [case] law tries to limit the beneficiaries of the [FOI] Act to those who have no selfish motivation but are trying to benefit only the public! If such [case] law were to prevail, perhaps 99% or more of those who seek information would be denied because of their exclusion from the words 'any person.' "

records are exempt from disclosure under the carefully crafted provisions of FOIA Exemption 7, disclosure will be denied.[19]

Although a first-party requester may gain access under FOIA to some records contained in a system of records which an agency has exempted under subsection (j) from the access and other provisions of the Privacy Act, the exemption will have several substantial effects. The requester still may have no right to request the amendment of any errors contained in the records; he still will have no right to know who has seen his records; and he still will have no right to bring a civil action for any violation of the Privacy Act. A first-party requester would, of course, have all these rights if the agency had not exempted the system of records under subsection (j). *See* 5 U.S.C. §§ 552a(c)(3), (d)(2)-(d)(4), (e)(1), and (g).[20]

In sum, the government cannot overcome the strong presumption against repeals by implication under either of the two relevant tests. It is inconceivable that Congress, having considered and adopted the proposed amendment to FOIA

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[19] The foregoing discussion underscores the obvious fact that the government's principal quarrel is with FOIA Exemption 7, not with any provision of the Privacy Act. Since Congress has steadfastly opposed the attempts of the executive branch to carve out a sweeping exemption for all law enforcement files, the executive branch has attempted to accomplish the same result, at least insofar as first-party requesters are concerned, by adopting the contrived construction of the Privacy Act which it urged successfully below. Since the subjects of government records are more likely than third-parties to seek access to law enforcement files, this Court's ratification of the government's construction would go far, as a practical matter, toward reinstating President Ford's veto of the 1974 amendment to FOIA Exemption 7.

[20] *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 81 ("Considering the wider access and administrative rigors of the Privacy Act we have no difficulty understanding why Congress allowed law enforcement agencies to restrict individual access to whole systems of records under the Privacy Act, while allowing the public, including the firstparty, more limited access to some of the same material under FOIA").

Exemption 7 at the same time it was debating the Privacy Act, would have expressly narrowed the scope of that exemption, for the benefit of all requesters, and then, without a single word on the subject, would have broadened it by implication, with respect to the class for whose especial benefit the Privacy Act was passed. Most important, Congress's true intent is manifest in subsection (b)(2) of the Privacy Act, which expressly preserves FOIA access to "any person," and in subsection (j), which limits the scope of its exemptions to the Privacy Act itself. No repeal by implication may be found in the face of those provisions.

D. The Holding Below Is Inconsistent With The Earliest Authoritative Constructions Of The Privacy Act.

The construction adopted by the court below is inconsistent with the earliest scholarly commentaries on the Privacy Act, which uniformly concluded that Congress had not intended to affect the FOIA disclosure rights of first-party requesters when it enacted the Privacy Act.[21] More important, the Seventh Circuit's construction of the Privacy Act is inconsistent with the position taken by those government officials " 'charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are as yet untried and new.' " *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961), *quoting*

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[21] Note, *The Privacy Act of 1974: An Overview*, 1976 Duke L.J. 301, 312-13 (1976); Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L.L.Rev. 596, 624-26 (1976); Hulett, *Privacy and the Freedom of Information Act*, 27 Ad.L.Rev. 275, 288 (1975); Project, *Government Information and the Rights of Citizens*, 73 Mich.L.Rev. 971, 1337-39 (1975); Note, *FOIA and Privacy Act Interface: Toward a Resolution of Statutory Conflict*, 8 Loy.U.Chi.L.J. 570, 590-92 (1977); *see also Guidebook to the Freedom of Information and Privacy Acts* 21 (P. Bouchard and J. Franklin ed. 1980).

Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294, 315 (1933).[22]

The Office of Management and Budget ("OMB"), which Congress specifically charged with developing government-wide guidelines and regulations for implementing the Privacy Act (PA Source Book 514 (Pub. L. No. 93-579, § 6 (1974))), promptly took the position that the disclosure rights granted to first-party requesters under both statutes were complementary rights. In 1975, prior to the date on which the Privacy Act was to take effect, the OMB adopted the following construction of the statute (40 Fed. Reg. 56742-43; emphasis in original):

> In a few instances the exemption from disclosure under the Privacy Act may be interpreted to be broader than the Freedom of Information Act (5 U.S.C. 552). In such instances the Privacy Act should not be used to deny access to information about an individual which would otherwise have been *required* to be disclosed to that individual under the Freedom of Information Act. . . . The net effect of this approach should be to assure the [sic] individuals do not as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment.

The OMB's construction of the Privacy Act is entitled to substantial weight, not only because it is the contemporaneous construction of the agency specifically charged by Congress with the task of construing the statute, but also because it represents "the predominant government policy since initial implementation," which "has been to allow an individual to seek access to information about himself through both the Privacy Act and FOIA." *Greentree* v. *U.S. Customs Service*, 674 F.2d at 85.

Thus, the Privacy Protection Study Commission, which Congress established in Section 5 of the Act (PA Source Book

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[22] *Accord FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *Ford Motor Credit Corp.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Southeastern Community College* v. *Davis* 442 U.S. 397, 406 (1979); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976).

510 (Pub. L. no. 93-579, § 5 (1974))), has adopted the same construction (*Report of the Privacy Protection Study Commission, Privacy Act of 1974: An Assessment*, App. 4 at 37 (1977)):

> An individual seeking access to an investigatory file, for example, may be able to obtain much broader access if he requests it under the FOIA, because the corresponding PA exemption applies to entire systems of records rather than to records or portions of the records they contain.

See also Senate Subcomm. on Admin. Practice and Procedure, Comm. on the Judiciary, *Report on Oversight Hearings on Agency Implementation of 1974 Amendments to the Freedom of Information Act*, 95th Cong., 2d Sess. 123 n.76 (Comm. Print. 1980) (the Privacy Act "was never intended to restrict access to reports under FOIA").[23]

Although Congress did not charge the Department of Justice with the task of construing and implementing the Privacy Act, the Seventh Circuit accorded weight to a regulation which the Department promulgated in 1975 (40 Fed. Reg. 50642). In that regulation, the Department concurred in the result reached by the OMB, but maintained that continued first-

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[23] The OMB's construction of the Privacy Act is also consistent with the analysis prepared by the Library of Congress, at the request of the Senate Subcommittee on Administrative Practice and Procedure, shortly before the effective date of the statute. The Library of Congress concluded that (PA Source Book 1187 (121 Cong. Rec. 32893 (1974))) "[t]here is nothing in the terms of the Privacy Act or its legislative history which indicates that the Privacy Act is the exclusive means by which an individual can gain access to his own records contained in a system of records." Indeed, "[i]t flies in the face of the whole legislative effort in this area to construe the Privacy Act as a backhanded method to limit individual access to records while at the same time preserving potentially greater access rights to third parties" (*id.*). *See also* 1976 *Annual Report of Congressional Research Service* 25 ("It should be quite apparent by this time that the Privacy Act does not constitute authority to withhold any records sought under the provisions of [FOIA]").

party access under FOIA was "discretionary," rather than mandatory. The Department, which had opposed enactment of the Privacy Act (*see* PA Source Book 772-75), originally took the position that the Privacy Act provided the exclusive means of first-party access, but moderated that view in the face of strong opposition from Congress (*id.* at 1176-1188), finally taking the position that continued access under FOIA was a privilege, not a right. As the *Greentree* court correctly observed (674 F.2d at 85), this regulation must be viewed with circumspection since it clearly represents an attempt to "moderate the impact of an unwelcome enactment." Moreover, the government's understandable lack of confidence in that construction is well demonstrated by the government's failure to rely on it in litigation for some six years after it was formulated. *See Greentree* v. *U.S. Customs Service*, 674 F.2d at 85. In any event, the Department's position lacks the power to persuade because it is contrary to the language and legislature of the statute.[24]

III.

PRIVACY ACT SUBSECTION (j) DOES NOT QUALIFY AS A FOIA EXEMPTION (b)(3) STATUTE.

The language and legislative history of the Privacy Act preclude any serious argument that its wholly discretionary and self-contained exemptions to first-party access may be used to block disclosure under FOIA. Continued first-party

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[24] In late 1981, when it filed its appellate brief in *Greentree*, the Department advised the District of Columbia Circuit that the OMB "is currently revising its guidelines to state that the Privacy Act should be considered a FOIA Exemption 3 statute" (674 F.2d 85 n.28). In August 1983, the OMB finally published a revised regulation, for notice and comment (48 Fed. Reg. 36359). That regulation conforms to the Department's present litigating position, but contains no reasoned discussion of the question nor any explanation for the OMB's change in position. *But see* 49 Fed. Reg. 12338 (1984). *See also* 130 Cong. Rec. H310-12 (daily ed. Jan. 31, 1984) (remarks of Messrs. English, Kindness, and Erlenborn).

access under FOIA is guaranteed to "any person" by subsection (b)(2) of the Privacy Act, and the exemptions contained in subsections (j) and (k) of the Privacy Act are expressly limited in their applicability to other provisions of the Privacy Act. *See* pages 11-19, *supra*. Even if these explicit provisions did not exist, however, the Privacy Act exemptions still could not be construed to block first-party access under FOIA. FOIA affirmatively requires that records be made "available to any person" (5 U.S.C. § 552(a)(3)). Thus, even absent the savings provisions contained in the Privacy Act, first-party requesters would still be entitled to seek disclosure under FOIA.

The Seventh Circuit held (J.A. 69) that the discretionary exemptions contained in the Privacy Act are incorporated into FOIA through FOIA Exemption 3. Based on a liberal construction of Exemption 3, which permits nondisclosure where matters (a) "are specifically exempted from disclosure," and (b) also meet the further requirements set forth in two provisos (5 U.S.C. § 552(b)(3)), the Seventh Circuit held (J.A. 69) that records must be deemed exempt from first-party disclosure under FOIA whenever they are contained in a system of records which has been exempted from first-party access under the Privacy Act. That holding is erroneous because subsection (j) of the Privacy Act does not constitute an FOIA Exemption 3 statute.[25]

FOIA Exemption 3 specifically authorizes the nondisclosure of matters that are "*specifically exempted from disclosure by statute* (other than Section 552b of this title), *provided that* such statute (A) requires that the matters be withheld from the public in such a manner as to leave *no discretion* on the issue, or (B) establishes *particular criteria* for withholding or refers to *particular types of matters* to be withheld" (5 U.S.C.

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[25] Neither the *Greentree* nor the *Porter* court found it necessary to reach this question because of their holdings that subsection (b)(2) of the Privacy Act expressly preserves all existing FOIA disclosure rights. *See Porter* v. *U.S. Dept. of Justice*, 717 F.2d at 797; *Greentree* v. *U.S. Customs Service*, 674 F.2d at 79.

§ 552(b)(3); emphasis added). Exemption 3, like all FOIA exemptions, is to be narrowly construed in furtherance of the policy of disclosure which is the heart of the statute. *See Dept. of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976). *See also Chrysler Corp.* v. *Brown*, 441 U.S. 281, 290 (1979).

Subsection (j) is not an Exemption 3 statute because it meets neither the "no discretion" requirement of proviso (A) nor the particularity requirement of proviso (B). In addition, subsection (j) permits withholding by agency rule; nothing is, by virtue of subsection (j) itself, "specifically exempted from disclosure by statute."

A. Subsection (j) Does Not Satisfy The Proviso Requirements Of Exemption 3.

Privacy Act subsection (j) is not an Exemption 3 statute because it fails to satisfy the requirements of either proviso of Exemption 3. First, subsection (j) does not qualify as an exempting statute under proviso (A) of Exemption 3, which "requires that matters be withheld *from the public* in such a manner as to leave *no discretion* on the issue" (5 U.S.C. § 552(b)(3)(A); emphasis added). The Privacy Act grants agencies uncanalized discretion to determine what should be withheld. Subsection (j) states that "[t]he head of any agency *may* promulgate rules . . . to exempt *any* system of records within the agency from *any* part of this section except subsection[](b) . . ." (5 U.S.C. § 552a(j); emphasis added). *See* PA Source Book 312 (H.R. Rep. 1416, 93d Cong., 2d Sess. 19 (1974)). Moreover, subsection (j) does not authorize withholding "from the public" because it permits withholding only from first-party requesters under the Privacy Act. Not even the government has contended that subsection (j) authorizes an agency to withhold from third-party requesters records that would otherwise be available to them under FOIA.

Second, subsection (j) does not satisfy the particularity requirements of proviso (B). Subsection (j) permits agencies to exempt from disclosure entire "systems of records." This subsection does not establish "particular criteria for withholding"

because it grants absolute discretion to agency heads to withhold whatever systems of records they please. Nor does subsection (j) refer "to particular types of matters to be withheld." The only argument that could possibly be made to support the view that subsection (j) refers "to particular types of matters to be withheld" is that subsection (j)(2) generally relates to systems of records maintained by law enforcement agencies. But that argument gives the term "particular" a construction so broad as to destroy its meaning. Moreover, that construction is inconsistent with the purpose that Congress has plainly expressed, both when it narrowed FOIA Exemption 7 in 1974 (*see* pages 25-27, *supra*), and when it narrowed FOIA Exemption 3 in 1976 (*see* pages 39-41, *infra*). Indeed, it is absurd to suggest that a statute refers to "particular types of matters" merely because its scope is "restricted" to any system of records maintained by law enforcement agencies.[26]

These important provisos were enacted in 1976 for the specific purpose of removing from the ambit of Exemption 3 those statutes which, like subsection (j), create unfettered agency discretion to withhold entire systems of files. The impetus for Congress's enactment of these provisos was the decision in *FAA* v. *Robertson*, 422 U.S. 255 (1975). In *Robertson*, this Court held that certain withholding provisions of the Federal Aviation Act (49 U.S.C. § 1504), which permitted the FAA to

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[26] Exemption 3 must be narrowly construed for the additional reason that the very concept of a categorical, systemwide exemption is inconsistent with the general requirement of FOIA subsection (b), that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting record after deletion of the portions which are exempt under this subsection" (5 U.S.C. § 552(b)). Similarly, a categorical exemption based on the location of a record within an administratively exempted "system of records" is inconsistent with the judicial review provisions of FOIA (5 U.S.C. § 552(a)(4)(B)), which require the courts to determine whether individual records and *parts* of records have properly been withheld. *See Vaughn* v. *Rosen*, 484 F.2d 828 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

withhold any "information in any application, report, or document filed pursuant to the provisions of this act or of information obtained" by the agency not in the public interest, constituted an Exemption 3 statute. The Court reached this conclusion based on its understanding that the legislative history manifested Congress's intention that Exemption 3 should be broadly construed to encompass all preexisting disclosure exemption statutes (422 U.S. at 265).[27] Congress's disagreement with that construction led to the addition of the two provisos in 1976. *See* Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241, 1247 (1976). The relevant House Committee Report succinctly states Congress's purpose (H.R. Rep. No. 880, pt. 1, 94th Cong., 2d Sess. 23 (1976)):

> Believing that the *[Robertson]* decision misconceives the intent of exemption 3 the Committee recommends that the exemption be amended to exempt only materials required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The committee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U.S.C. §§ 2161-2166, which provides explicitly for the protection of certain nuclear data.
>
> Under the amendment, the provisions of the Federal Aviation Act of 1958 that was the subject of Robertson, and which affords the FAA administrator *carte blanche* to withhold any information he pleases would not come within Exemption 3.

See also H.R. Rep. No. 1441, 94th Cong., 2d Sess. 25 (1976).

The import of these provisos is plain. As the District of Columbia Circuit has held, "Congress did not want the exemption to be triggered by every statute that in any way gives administrators discretion to withhold documents from the pub-

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[27] Some lower courts, of course, had reached the opposite conclusion, even prior to the adoption of the two provisos. *See, e.g., Schechter* v. *Weinberger*, 506 F.2d 1275, 1276 (D.C. Cir. 1974); *Stretch* v. *Weinberger*, 495 F.2d 639, 640-41 (3d Cir. 1974).

lic." *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1220(D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980) (footnote omitted). *See also Church of Scientology* v. *U.S. Postal Service*, 633 F.2d 1327, 1333 (9th Cir. 1980) ("investigatory files . . . complied for law enforcement purposes" lacks specificity required "to take it out of the impermissible range of agency discretion to make decisions rightly belonging to the legislature"). Thus, these provisos manifest Congress's intention to distinguish between those statutes which "in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard." *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 629 (D.C. Cir. 1978) (emphasis in original). *See also CPSC* v. *GTE Sylvania*, 447 U.S. 102, 121-22 n.18 (1980).

Since subsection (j) plainly grants absolute and unreviewable discretion to agency heads, and establishes no criteria to inform that discretion, subsection (j) does not meet the requirements of either proviso.

B. Subsection (j) Does Not Satisfy The Requirement Of Exemption 3 That Matters Be Exempt "From Disclosure By Statute."

Even if the proviso requirements of Exemption 3 could be ignored, subsection (j) still would not qualify as an Exemption 3 statute. The scheme established in subsection (j) grants unfettered discretion to agency heads to exempt whatever they please. Of its own force, however, subsection (j) exempts nothing. Thus, whatever is exempted under subsection (j) is exempted by agency rule, not "by statute." This distinction is critical because the language and legislative history of FOIA Exemption 3 both manifest Congress's intention that the question whether particular materials should be exempt from disclosure is a question which must be answered by the legislative branch, rather than by agency officials. *See* H.R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976).

To qualify under Exemption 3, a statute must contain words of congressional exemption, not mere authorization for further

administrative action. *E.g.*, *Baldridge* v. *Shapiro*, 455 U.S. 345, 355 (1982); *CPSC* v. *GTE Sylvania*, 447 U.S. 102, 122 (1980); *Seymour* v. *Barabba*, 559 F.2d 806, 808-09 (D.C. Cir. 1977). As the Ninth Circuit held in *California* v. *Weinberger*, 505 F.2d 767, 768 (1974):

> There is a real difference between a statute in which the congressional words themselves prohibit disclosure and a statute which authorizes an administrator to exempt from disclosure. In the latter case the exemption is a creature of the administrator and does not fall within the meaning of the words "specifically exempted . . . by statute."

Subsection (j) merely authorizes administrative officials to establish exemptions by regulation. Discretionary exemption by agency rule is not equivalent to an exemption which is created by statute *ex proprio vigore*. *Founding Church of Scientology* v. *Bell*, 603 F.2d 945, 952 (D.C. Cir. 1979); *Lee Pharmaceutical* v. *Kreps*, 577 F.2d 610, 616 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979). Thus, even if an agency established its own criteria to structure the discretion granted by subsection (j), the "by statute" requirement of Exemption 3 still would not be satisfied.

At all events, Privacy Act subsection (j) does not exempt records "from disclosure." Just as subsection (j) does not withhold "from the public" as contemplated by proviso (A) of Exemption 3, subsection (j) cannot be deemed to exempt records "from disclosure" because it does not authorize agencies to withhold records from *all* requesters. It merely exempts records "from any part of this section," which extends, at most, to the Privacy Act's first-party access provision. To exempt "from disclosure," a statute must keep information confidential. *See Public Citizens Health Research Group* v. *FDA*, 704 F.2d 1280, 1284-86 (D.C. Cir. 1983); *Ferri* v. *Bell*, 645 F.2d 1213, 1217 n.4 (3rd Cir. 1981). Pursuant to subsection (j), agencies are specifically precluded from withholding any records that must be disclosed under other disclosure statutes, such as FOIA (*see* 5 U.S.C. § 552a(b)(2)). Even assuming that subsection (j) permitted withholding insofar as first-party re-

questers are concerned, it is disputed that it could not properly be construed to permit withholding from third-party requesters, and it is therefore clear that this section does not meet the requirements of Exemption 3.

C. The Legislative History Evidences No Congressional Intention That Subsection (j) Be Considered An Exemption 3 Statute.

The legislative history of the Privacy Act contains no suggestion that subsection (j) should be considered an FOIA Exemption 3. *See* 2 J. O'Reily, *Federal Information Disclosure Procedures, Forms and the Law* § 2013 (1981). Although legislative silence may sometimes be considered ambiguous, that is not true in this case. When that silence is considered in light of the fact that Congress was considering this statute at the same time it was revisiting FOIA in late 1974, and was intimately familiar with the provisions of both statutes, it is inconceivable that Congress would have intended the Privacy Act to constitute an Exemption 3 statute without ever mentioning that intention. Moreover, in 1976, when Congress revisited FOIA Exemption 3 in connection with its overruling of this Court's decision in *FAA* v. *Robertson*, 442 U.S. 255 (1975), Congress explicitly considered the relationship of Exemption 3 to numerous statutes, but again, it never mentioned the Privacy Act (H.R. Rep. No. 880, 94th Cong., 2d Sess. (1976)). In light of the failure of subsection (j) to meet the literal requirements of Exemption 3, this legislative silence would be remarkable only if Congress had actually intended subsection (j) to be an Exemption 3 statute.[*]

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[*] Significantly, by the time Congress amended Exemption 3 in 1976, the OMB had already promulgated its construction of the Privacy Act, which held that FOIA and the Privacy Act provided complementary rights to first-party requesters (*see* pages 38-39, *supra*). Only if Congress had disagreed with that construction, which remained the prevailing government policy until late 1981 (*Greentree* v. *U.S. Customs Service*, 674 F.2d at 85), would Congress have had any cause to mention the question in 1976. Since Congress had

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded to the district court to determine whether the requested records must be disclosed under FOIA.

Respectfully submitted.

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explicitly required the OMB to take responsibility for construing and implementing this important statute, it is certainly proper to assume that Congress was aware of the OMB's construction. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("[i]t is always appropriate to assume that our elected officials, like other citizens, know the law").

APPENDIX

APPENDIX A

STATUTES INVOLVED

United States Code, Title 5:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

* * *

(a) Each agency shall make available to the public information as follows:

* * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a crimnal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize wihholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

* * *

§ 552a. Records Maintained on individuals

(a) Definitions

* * *

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence.

* * *

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

* * *

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

* * *

(2) required under section 552 of this title;

* * *

(c) Accounting of certain disclosures

Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsection (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

* * *

(d) Access to records

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his dis-

agreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements

Each agency that maintains a system of record shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

* * *

(j) General exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553 (b)(1), (2), and (3), (c), and (e) of this

title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (3)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

* * *

(q) Effect of other laws

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.